TG MOHD SHAHRIZAL TG ZAINAL ABIDIN

v.

MENTERI HAL EHWAL DALAM NEGERI MALAYSIA & ANOR

HIGH COURT MALAYA, KOTA BHARU
IDRIS YUSOFF J
[CRIMINAL TRIAL NO: 44-4-1998]
16 SEPTEMBER 1998

ADMINISTRATIVE LAW: *Remedies - Habeas corpus - Rehabilitation of drug dependant - Order of residence under s. 7 Drug Dependants (Treatment and Rehabilitation) Act 1983 - Application for writ of habeas corpus - Whether procedurally proper - Whether applicant must apply for writ of certiorari - Federal Constitution, art. 5(1) & (2) - Courts of Judicature Act 1964, s. 25(1) - Criminal Procedure Code, s. 365 - Drug Dependants (Treatment and Rehabilitation) Act 1983, ss. 6(1), 7*

CRIMINAL PROCEDURE: *Habeas corpus - Rehabilitation of drug dependant - Order of residence under s. 7 Drug Dependants (Treatment and Rehabilitation) Act 1983 - Writ of habeas corpus - Allegation of procedural irregularity - Whether order of residence amenable to challenge by way of habeas corpus application - Whether applicant must first apply for writ of certiorari to quash order - Federal Constitution, arts. 5(1), 5(2) - Courts of Judicature Act 1964, s. 25(2) - Criminal Procedure Code s. 365 - Drug Dependants (Treatment and Rehabilitation) Act 1983, ss. 6(1), 7*

The applicant had breached the terms of a bond issued by the learned magistrate under to s. 6(1) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 ('the Act'), and was ordered to reside at the Rehabilitation Centre, Besut, for a period of two years pursuant to s. 7 of the Act. The applicant contended that the decision making process that culminated in the magistrate's order was tainted with irregularity, and so applied for a writ of *habeas corpus* for his release. Before the learned judge, however, the respondents raised a preliminary objection and submitted, in essence, that it was improper of the applicant to have applied for a writ of *habeas corpus* without first resorting to an application for *certiorari*. The applicant retorted that by virtue of s. 25(2) of the Courts of Judicature Act 1964, the court was very much seised with jurisdiction to hear the *habeas corpus* application. It was also argued that with the deletion of O.54 Rules of the High Court 1980 in August 1993, the only "written law" applicable in respect of *habeas corpus* is Chapter XXXVI of the Criminal Procedure Code, *vide* s. 365 thereof, and that under that section, the High Court can clearly hear an application for *habeas corpus* if a detention is alleged to be illegal or irregular.

Held:

[1] It is settled law that where there has been a criminal conviction, the courts had excluded collateral attack by *habeas corpus*, as the proper remedy lies by way of appeal. It is however equally settled that if any person is dissatisfied with the order of the learned magistrate under s. 6 of the Act because of some irregularity, he should have access to the High Court but not through the appeal process.

[2] The object of the writ of *habeas corpus, inter alia,* is to secure immediate release from unlawful or unjustifiable detention. The emphasis is on "immediate release" and to achieve that there ought to be an element of promptness both in the procedure adopted and of the decision obtained. That being so, the procedure as suggested by the prosecution, namely, that the applicant should first apply for *certiorari* and follow that with a *habeas corpus* application, is time-consuming and negates the very purpose of *habeas corpus* in terms of promptness and effectiveness.

[3] The right to the issue of *habeas corpus* stems from the right conferred by Art. 5(1) of the Federal Constitution which ensures that there should not be any deprivation of a person's life or personal liberty save in accordance with law. "Law" here includes procedural provisions of the law. It follows, therefore, that if a person is detained without following the procedure prescribed by the relevant law, or if the procedure prescribed is unfair, he should be entitled to be released.

[4] In view of article 5(2) of the Federal Constitution, s. 25 of the Courts of Judicature Act 1964 and Chapter XXXVI of the Criminal Procedure Code, the procedure adopted by the applicant herein to challenge his detention through the application for the issue of writ of *habeas corpus* is not inappropriate. The preliminary objection, hence, ought to be overruled.

[Preliminary objection overruled; court to hear application on merits.]

Cases referred to:
Ahmad Bashid Abdul Malek & Ors [1998] 2 CLJ 457 ***(refd)***
Ang Gin Lee v. PP [1991] 1 MLJ 498 ***(foll)***
Healey v. Minister of Health [1955] 1 QB 221 ***(refd)***
King v. Commanding Officer of Morn Hill Camp, Winchester [1917] 1 KB 176 ***(refd)***
Munusamy v. Subramaniam & Ors [1969] 2 MLJ 108 ***(refd)***
Phillip v. Director of Public Prosecutions [1992] 1 AC 545 ***(refd)***
R v. Governor of Pentonville prison ex p Azam [1973] 2 All ER 741 ***(refd)***
Re Tan Boon Liat & Anor [1977] 2 MLJ 108 ***(refd)***
Reg v. Governor of Brixton Prison, ex p Armah [1968] AC 192 ***(refd)***
Reg v. Secretary of State for the Home Department, ex p Cheblak [1991] 1 WLR

890 ***(refd)***
Reg v. Secretary of State for the Home Department, ex p Khawaja [1984] AC 74 ***(refd)***
Reg v. Secretary of State for the Home Department, ex p Muboyayi [1991] 4 All ER 72 ***(refd)***
Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan [1996] 2 CLJ 771 ***(refd)***
Teh Guan Teik v. Insp General of Police & Anor [1998] 3 CLJ 153 ***(refd)***
Yeap Hock Seng v. Minister for Home Affairs Malaysia & Ors [1975] 2 MLJ 279 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 25(2)
Criminal Procedure Code, s. 365
Drug Dependants (Treatment and Rehabilitation) Act 1983, ss. 6(1)(b), (3), (4), 7, 19(1)
Federal Constitution, arts. 5(1), (2)
Rules of the High Court 1980, O. 54
Rules of the Supreme Court 1957 [UK], O. 53, O. 54

Other sources referred to:
Administrative Law of Judicial Review and Statutory Appeals, Oct 1994, Law Com No 226
Administrative Law of Malaysia and Singapore, 3rd edn, p 636
Halsbury's Laws of England, 4th edn, vol II, para 1455
Hamid's Criminal Procedure, 1994 edn, p 814
Judicial Review of Administrative Action, De Smith, Woolf & Jowels, 5th edn, p 678, para 15-050
Prem's Judicial Dictionary, 1964, vol 2, p 767

For the applicant - Apandi Ali; M/s Apandi Ali & Co
For the respondents - Zaliha Mohd Janis, FC

Reported by WA Shariff

JUDGMENT

Idris Yusoff J:

The applicant was ordered by the magistrate pursuant to s. 7 of the Drug Dependants (Treatment and Rehabilitation) Act 1983 (the Act) to reside at the Rehabilitation Centre Besut, Terengganu for a period of two years commencing from 22 December 1997 to undergo treatment and rehabilitation and thereafter to undergo after care in accordance with the provisions of the Act relating thereto, after being satisfied that the applicant had breached the terms of the bond imposed on him by the magistrate at Pasir Mas on 6 December 1995 under s. 6(1)(b) of the Act.

Being dissatisfied with the said order, the applicant applied for the issue of a writ of *habeas corpus ad subjiciendum* directed to the superintendant Pusat Pemulihan Serenti, Besut Terengganu to have the said applicant brought up before the High Court at Kota Bharu for the purpose of determining the legality or otherwise of his detention. In support of the application was an affidavit sworn by the applicant himself on 18 January 1998.

Before the hearing of the application, learned federal counsel representing both respondents gave notice of intention to raise a preliminary objection relating to the mode of proceedings adopted by the applicant.

On the day of hearing, learned federal counsel submitted that the procedure resorted to was wrong – principally due to the fact that the complaint as advanced by the applicant was not on the detention order itself since the detention was lawful under s. 19(1) of the Act but more on the decision making process allegedly carried out by the magistrate as not being in consonance with the provisions of s. 7 of the Act. In the circumstances, as submitted further by the learned federal counsel, if the applicant felt so justified he should have proceeded to challenge the decision making process by way of *certiorari* to have it quashed and thereafter to institute further proceedings to secure his release from the rehabilitation centre. Until the process of decision making is quashed, it would be premature for the applicant to apply for the issue of a writ of *habeas corpus.* In so submitting the learned federal counsel placed strong reliance on the English case of the *King v. Commanding Officer of Morn Hill Camp, Winchester* [1917] 1 KB 176. As can be gathered from the report the Court of Appeal held that the decision of an inferior court upon a matter the decision of which is entrusted to that court cannot be questioned by means of a writ of *habeas corpus.* The facts in that case were that: An Irishman who had temporarily got work in England was brought before a magistrate for failing to comply with an order calling him up from the reserve for permanent service. In pursuance of the powers conferred upon him the magistrate handed him over to the military authorities as being a person who for the time being was ordinarily resident in Great Britain and as such deemed to be enlisted and transferred to the reserve. The military authorities detained him:

Held, that a writ of *habeas corpus* would not lie to question the decision of the magistrate. The learned federal counsel also quoted the judgment of Lord Reading CJ at p. 179:

> If the jurisdiction exercised by the magistrate is a jurisdiction which has been conferred upon him by the statute, then, notwithstanding that he may have come to a wrong decision on the facts or upon the law it is clear that his decision cannot be questioned by this procedure.

In the instant application the principle in the above quoted case, submitted by the learned federal counsel should be made applicable since under the Act, the magistrate was bound to comply with the mandatory provisions of ss. 6(1), 6(3) and 6(4) thereof and as the record of proceedings so shows the magistrate had fully complied with those sections, furthermore the magistrate had been conferred by the Act with the necessary power to issue the said order.

However, on going through the reports of the case, it is clear that the judgment did not stop there for His Lordship gave his reasons for coming to that decision. On the same page immediately after the passage quoted by the federal counsel, His Lordship continued:

> In the present case there is no doubt as to the jurisdiction of the magistrate. It is not suggested that he was not the proper tribunal to deal with the case. It is suggested that he came to a wrong conclusion. But if an erroneous decision of a magistrate entitled a party detained by the magistrate's order to come to this Court for a writ of *habeas corpus*, that writ would furnish a ready means of appealing to this Court from every decision of a magistrate ordering the detention of an offender. If there were no means of questioning a magistrate's order, there might be some ground for invoking the assistance of this Court in the way chosen in this case, but there is a well-known procedure by way of a special case whereby the decisions of magistrates can be inquired into. In my opinion we have no jurisdiction to interfere in such a case as the present ...

It is obvious in that case the decision of the magistrate could not be challenged in the manner adopted by the applicant since the avenue available to him in order to challenge such decision was to proceed by way of appeal.

It is settled law that where there has been a criminal conviction, the courts had firmly excluded collateral attack by *habeas corpus*, holding that the only proper remedy lies by way of appeal. And it is equally settled that if any person is dissatisfied with the order of the magistrate made under s. 6 of the Act because of some irregularity, he should have access to the High Court but not through the appeal process – see *Ang Gin Lee v. Public Prosecutor* [1991] 1 MLJ 498 (SC) and at p. 501 Hashim Yeop Sani CJ (Malaya) said:

> This judgment merely lays down the law that according to existing provisions of the law there is no appeal or revision by the High Court from the order of the magistrate under sec. 6 of the Act.

The learned federal counsel also relied on the case of *Inspector General of Police & Anor. v. Teh Guan Teik*, an unreported decision of the Court of Appeal, wherein the court accepted the preliminary objection raised by the federal counsel appearing for the appellants relating to the mode of proceedings

adopted by the respondent as it held that the respondent should have applied for an order of *certiorari* instead of filing a writ seeking a declaratory judgment for a declaratory judgment will not quash a decision of the inferior tribunal. In so holding, the court relied on an English case of *Healey v. Minister of Health* [1955] 1 QB 221.

However the decision of the Court of Appeal was reversed by the Federal Court – see *Teh Guan Teik v. Insp. General of Police & Anor*. [1998] 3 MLJ 137 ([1998] 3 CLJ 153). Peh Swee Chin FCJ held that the entrenched principle that declaration and *certiorari* are not mutually exclusive and are concurrent remedies was asserted several times in the United Kingdom and followed by our courts. At p. 147, 2nd paragraph, His Lordship said:

> Before us, learned counsel for the Inspector-General of Police persisted with the line of argument based on the ratio of the Court of Appeal in the instant case, ie that the correct procedure should have been an application for order of *certiorari* as provided under O. 53 of the Rules of High Court 1980 ('the RHC'). No authority was cited by him. Learned counsel for the police sergeant on the other hand, relied on the well known case of *Surinder Singh Kanda v. Goverment of Federation of Malaya* [1962] MLJ 169, being a Privy Council appeal from the then Malaya in which Lord Denning held, in an action for declaration that the dismissal of a police inspector, was void, and the Privy Council agreed with the view of the High Court in that case that the remedy by way of declaration, was also available to the inspector as well as the remedy by *certiorari*. Lord Denning was delivering the opinion of the Board. Learned counsel for the police sergeant also relied on *Sugumar Balakrisnan v. Chief Minister of the State of Sabah & Anor* [1989] 1 MLJ 233 in which it was held that the fact that the remedy of *certiorari* was available to the plaintiff then could not debar him from claiming the remedy of declaration and both were concurrent remedies.

On the following page (p. 148), 2nd paragraph, he continued:

> To dislodge such a remedy by declaration from its entrenched position would require clear and strong words from a statute.

In *Ahmad Bashid bin Abdul Malek & Ors* [1998] 6 MLJ 112 ([1998] 2 CLJ 457) Azhar Hj. Ma'ah JC (as he then was) allowed a preliminary objection by senior federal counsel when he held that the remand order issued by the magistrate after due inquiry under s. 6 of the Act is a judicial order which is in force until it is set aside or specially quashed by an order of a higher court "by way of an appeal or revision". Hence the issuance of *habeas corpus* is not an appropriate remedy as the complaint therein, similar to the one in the present application, is levelled at the process of decision making adopted by the magistrate and not at the legality or otherwise of the order itself – *The King v. Commanding Officer (supra)* was cited in support – hence *habeas corpus* in the circumstances will not quash the order of the magistrate.

The learned Judicial Commissioner in his judgment, also differentiated between a decision made by a Tribunal after holding an inquiry and the order made by a magistrate after judicial proceedings and the effectiveness of the remedies of both *habeas corpus* and *certiorari*.

Tuan Hj. Mohd. Apandi Ali, counsel for the applicant, however, contended that the jurisdiction of the court to hear the application for *habeas corpus* is provided by s. 25(2) of the Courts of Judicature Act 1964. It reads:

> (2) Without prejudice to the generality of subsection (1), the High Court shall have additional powers set out in the Schedule:
>
> Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same.

The Schedule to s. 25(2) *inter alia* reads under the heading Prerogative Writs:

> Power to issue to any person or authority directions, orders or writs including writs of the nature of *habeas corpus, mandamus,* prohibition, *quo warranto* and *certiorari* or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.

He went on to submit that with the deletion of O. 54 Rules of the High Court in August 1993, the only "written law" presently available and applicable in respect of *habeas corpus* is Chapter XXXVI of the Criminal Procedure Code *viz.* section 365. The section reads:

> 365 – Power of the High Court to make certain orders.
>
> The High Court may whenever it thinks fit direct -
>
> (1) that any person who –
>
> (a) is detained in any prison within the limits of the Federation on a warrant of extradition whether under the Extradition Ordinance, 1958, or the Commonwealth Fugitive Criminals Act, 1967; or
>
> (b) is alleged to be illegally or improperly detained in public or private custody within the limits of the Federation,
>
> be set at liberty;
>
> (2) that any defendant in custody under a writ or attachment be brought before the Court to be dealt with according to law.

The sections following deal with the form of application, the affidavit in support thereof and the further steps required to be taken by the defendant. Counsel also placed greater emphasis on the phrase "alleged to be illegally or improperly detained" whereupon, as further submitted by him that despite a magistrate's order the High Court can still hear application for *habeas corpus* if there are allegations of illegality or impropriety of detention.

He also referred to *Hamid's Criminal Procedure* 1994 Edn at p. 814 which reads:

> Detention becomes illegal – when ... Generally speaking, a detention would be illegal in any of the following circumstances:
>
> (a) Lack of legal authority ...
>
> (b) Validity of the law ...
>
> (c) Misconstruction of the statute. – If an action is taken under a statute, but by misconstruing its provisions, such an action would be unsustainable. It is apparent that in a matter involving personal freedom, the letter of the law must be followed strictly and its provisions cannot be allowed to be watered down due to any misconception or misconstruction.
>
> (d) Violation of the safeguards. – If the detention be in violation of the constitutional safeguards, similar would be the position.
>
> (e) Existence of improper purposes ... The writ of *habeas corpus* is designed to protect the personal freedom of those who have been illegally detained in prison, hospital or private custody ... Unlike the prerogative orders of *certiorari*, prohibition and *mandamus*, *habeas corpus* is not a discretionary writ. It is available as of right, though good cause must be shown. If the evidence shows a *prima facie* case that the detention is unlawful, the Court is under a duty to issue the writ. Since every detention is *prima facie* unlawful, the burden of proof is on the detainer to justify it.

In *R v. Governor of Pentonville Prison ex-parte Azam* [1973] 2 All ER 741 at p. 751 Lord Denning MR said:

> Under Sch. 2, the power to detain or remove applies in respect to a person who is in truth an illegal entrant. If a man can make a *prima facie* case that he is not an illegal entrant, he is entitled to a writ of *habeas corpus* as of right: see *Green v. Secretary of State for Home Affairs* per Lord Wright. The court has no discretion to refuse it. Unlike *certiorari* or *mandamus*, a writ of *habeas corpus* is of right to every man who is unlawfully detained. If a *prima facie case* is shown that a man is unlawfully detained, it is for the one who detains him to make a return justifying it.

Prem's Judicial Dictionary 1964 vol 2 p. 767 says:

> The writ of *habeas corpus ad subjiciendum*, commonly known as the writs of *habeas corpus*, is a prerogative process for securing the liberty of the citizen by affording an effective means of immediate release from unlawful or unjustifiable detention whether in prison or in private custody. The writ is applicable as a remedy in all cases of wrongful deprivation of personal liberty.

There also appears in *Halsbury's Laws of England* 4th Edn. Vol. II – in para 1455 –

> The writ of *habeas corpus ad subjiciendum*, unlike the other writs of *habeas corpus*, is a prerogative writ, that is to say it is an extraordinary remedy, which is issued upon cause shown in cases where the ordinary legal remedies are inapplicable or inadequate. The writ is a writ of right and is granted *ex debito justitiae* ... The writ may not in general be refused merely because there exists an alternative remedy by which the validity of the detention can be questioned.

In *Yeap Hock Seng @ Ah Seng v. Minister for Home Affairs Malaysia and Others* [1975] 2 MLJ 279, Abdoolcader J (as he then was) held:

> (1) the grant of *habeas corpus* is as of right and not in the discretion of the court in the circumstances of a fundamental right guaranteed by the Constitution being involved and section 365 of the Criminal Procedure Code (F.M.S. Cap.6) must now therefore be read in this light and as modified accordingly by the application of the provisions of article 162(6) of the Constitution;
>
> (2) a person is entitled to seek a writ of *habeas corpus* as of right and is not obliged to rely on the less convenient remedy of appeal or any other alternative remedy provided by statute. The existence of an alternative remedy, however convenient, beneficial and effectual does not prevent the issue of a writ of *habeas corpus* and it is open to the court notwithstanding to examine the legality of the impugned detention;

It is to be observed that the object of the writ of *habeas corpus*, *inter-alia*, is to secure immediate release from unlawful or unjustifiable detention as such detention tantamounts to depriving the person's personal liberty. The emphasis is on "immediate release" as it is felt that if the detention is found to be unlawful or unjustified, the detainee should not have to undergo any further detention – not even a minute longer. And to achieve such object, it must ensure that there ought to be an element of promptness both in the procedure adopted and of the decision thereon obtained.

As submitted earlier by the learned Federal Counsel, the applicant in the instant application should have applied to the court first to have the magistrate's order quashed and thereafter followed by an application for the issue of a writ of *habeas corpus*. To my mind, such a procedure would evince a time-consuming feature in the whole exercise and would negate the very purpose and object of *habeas corpus* in terms of promptness and effectiveness! Perhaps it ought to be mentioned that where the writ of *habeas corpus* is applied for, the courts would invariably accord precedence over all other court business in view of the attendant promptness it requires.

De Smith, Woolf and Jowels, *Judicial Review of Administrative Action*, 5th Edn at p. 678 para 15-050, says under the heading "Scope of review":

> It is difficult to present a coherent and concise account of the extent of judicial review in *habeas corpus* applications for the law is riddled with contradictions. In particular it is not clear whether the scope is, or should be, more limited than in O. 53 proceedings. There is now a high judicial and academic authority for the proposition that the approach of the courts in both forms of judicial review proceedings should be the same.

The inter-relation between *habeas corpus* and judicial review was considered recently by the Law Commission in its report *Administrative Law: Judicial Review and Statutory Appeals* (October 1994) (Law Com. No. 226) – although the commission noted that the case law is riddled with contradictions, but nevertheless it concluded "against subsuming *habeas corpus* into judicial review procedure, albeit at the same time suggesting that the scope of review in both should be substantially the same".

It would also been se that in a number of decisions of the House of Lords – *Reg v. Governor of Brixton Prison, Ex-parte Armah* [1968] AC 192 and *Reg v. Secretary of State for the Home Department, Ex-parte Khawaja* [1984] AC 74 and a decision of Privy Council, *Phillip v. Director of Public Prosecutions* [1992] 1 AC 545 they contain dicta suggesting that the writ of *habeas corpus* has a wide reach. The facts in *Phillip's* case are that:

> During an insurrection in Trinidad by a group of which the 114 applicants were members, the Prime Minister, certain Members of Parliament and other persons were held captive. In order to secure their release the Acting President granted a pardon in the form of a general amnesty to all those involved in acts of insurrection. The captives were eventually released and the applicants surrendered. They were arrested and detained in custody. They were charged with treason, murder and other offences alleged to have been committed while they were involved in the insurrection. They applied to the High Court for redress by way of originating motion alleging that since they were the beneficiaries of a valid pardon their detention and prosecution for offences in respect of which the pardon had been granted infringed their right to liberty and security of the person and the right not to be deprived thereof except by due process of law. Eight of the applicants also applied to the High Court for leave to issue a writ of *habeas corpus* directing the Commissioner of Prisons to show cause why they should not be released immediately, alleging that by reason of the pardon their detention was illegal. The judge held that a person who relied on a pardon could only raise it as a plea in bar on arraignment in accordance with section 32 of the Criminal Procedure Act, and that, therefore, since no infringement of the Constitution was disclosed, the court had no jurisdiction to entertain the motion. In the *habeas corpus* proceedings the applicants were refused leave by a different judge, who held that such proceedings could not be brought on the basis of a pardon, which could only

be relied on by an accused on arraignment. The Court of Appeal upheld both decisions.

On the applicants' appeals to the Judicial Committee:-

> Held, allowing the appeals, (1) that the applicants had established *prima facie* that they were the beneficiaries of a valid pardon which would render their detention and imprisonment on charges relating to offences covered thereby unlawful, and it was for the Commissioner of Prisons and the Attorney-General to justify the detention; that, accordingly, the applicants were entitled to a writ of *habeas corpus* as of right so that the lawfulness of their imprisonment could be immediately determined, and at that hearing the court would have jurisdiction to inquire into the validity of a pardon even though, if the applicants were not released, they would be entitled under section 32 of the Criminal Procedure Act to assert the pardon again as a special plea in bar to the indictment when they were arraigned; and that, therefore, all the applicants would be granted leave to issue a writ of *habeas corpus.*
>
> Decisions of the Court of Appeal of Trinidad and Tobaga reversed.

It is also of great help to mention two other decisions of the English Court of Appeal – *Reg v. Secretary of State for the Home Department, Ex-parte Cheblak* [1991] 1 WLR 890 and *Reg v. Secretary of State for the Home Department Ex - parte Muboyayi* [1991] 4 All ER 72. In *Cheblak's* case, Lord Donaldson M.R. sought to limit the scope of *habeas corpus* by reasserting a distinction between the types of challenge available in *habeas corpus* application under RSC O. 54 and the prerogative remedy under RSC O. 53 application ie, *certiorari*. *Ex-parte Cheblak* was followed in *Ex-parte Muboyayi*. However according to Law Commission report, it criticises the two decisions and prefers *Ex-parte Armah,* in particular, as an authority for a wider scope of review on *habeas corpus.*

Perhaps it may be useful also to cite the last passage in the judgment of Taylor LJ at p. 91 in *Muboyayi's* case:

> The great writ of *habeas corpus* has over the centuries been a flexible remedy adaptable to changing circumstances. Time was when it was used in conjunction with *certiorari* in a manner characterised as *certiorari* in aid of *habeas corpus.* I see no reason why, in the changed circumstances of the 1990s and especially in immigration cases involving applicants entering and being removed from the jurisdiction, the roles of these two remedies should not be reversed so as to provide *habeas corpus* in aid of *certiorari.*

In Malaysia, the historical background of *habeas corpus* was traced by Abdul Hamid J (as he then was) in *Munusamy v. Subramaniam & Ors.* [1969] 2 MLJ 108. In that case, it was held:

(1) the power to issue directions, orders or writs including writs of the nature of *habeas corpus* for the enforcement of any of the rights conferred by Part II of the Constitution of Malaysia are specifically provided as an additional power for the High Court under section 25 of the Courts of Judicature Act, 1964, but such power must be exercised in accordance with any written law or rules of court relating to the same;

(2) the only written law relating to directions of the nature of *habeas corpus* is to be found in Part XXXVI of the Criminal Procedure Code and therefore the proper procedure in this case would be for the applicant to apply under section 365 of the Criminal Procedure Code and not by the *ex parte* originating summons in chambers.

The right to the issue of writ of *habeas corpu*s basically stems from the right conferred by Art. 5(1) of the Constitution which ensures that there should not be any deprivation of a person's life or personal liberty save in accordance with law. But for sometime, the word 'law' was understood to mean substantive provisions of the law, excluding the procedural provisions, so that compliance only with the former will be sufficient authority to regard detention as valid. However in *Re Tan Boon Liat @ Allen & Anor* [1977] 2 MLJ 108, Lee Hun Hoe CJ (Borneo) commented at p. 114 as follows:

For myself I find it difficult to see how our Article 5 could be interpreted to exclude the question of procedure even though there is no mention of procedure. The exclusion of procedure is merely an inference drawn from the remarks of Suffian F.J. in Karam Singh's case. He was merely pointing out the difference in the wordings of the Indian Constitution and our Constitution. He did not say that procedure was not part of the law. I am inclined to agree with Encik Karpal Singh's contention that the expression "in accordance with the law" in Article 5 of our Constitution is wide enough to cover procedure as well. Here the point is not whether the question of procedure is more important under one Constitution than under the other. If the expression "in accordance with law" were to be construed as to exclude procedure then it would make nonsense of Article 5.

And at p. 116 1st column Ong Hock Sim FJ had this to say:

... Secondly, there are mandatory rules, even of procedure, which cannot be passed over lightly as irregularities, because they are incurably illegal as being in contravention of strictly imperative provisions – see *N.A. Subramania Iyer v. King-Emperor* 28 I.A. 257.

In a recent case, the Court of Appeal had occasion to consider this point where Gopal Sri Ram, JCA, in *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan* [1996] 2 CLJ 771; [1996] 1 MLJ 268 at p. 286 said:

> As I have earlier said, the expression 'law' which appears in arts 5(1) and 8(1) of the Federal Constitution includes procedural law, and in particular, any procedure prescribed by written law. If a particular procedure prescribed by written law is found to be arbitrary or unfair or the procedure adopted in a given case is held to be unfair, then, generally speaking, it must be struck down as offending art 5(1) read with art 8(1).

From the aforesaid decision, "it follows that if a person is detained without following the procedure prescribed by the relevant law, or if the procedure prescribed is unfair, then he should be entitled to be released. The court shall quash his detention in such a case by issuing *habeas corpus*" see commentaries in M.P. Jain *Administrative Law of Malaysia and Singapore* – Third Edition p. 636.

In the result, for reasons stated above I hold that the procedure adopted by the applicant to challenge his detention through the application for the issue of writ of *habeas corpus* is not inappropriate or out of place and in view of Art. 5(2) of the Federal Constitution, s. 25 of the Courts of Judicature Act 1964 and Chapter XXXVI of the Criminal Procedure Code, I accordingly overrule the preliminary objection raised by the Federal Counsel.

There are a few other criminal applications of similar nature which are registered as 44-1-98, 44-7-98, 44-10-98, 44-11-98 and 44-14-98. In all these applications preliminary objections were raised on the same ground as in this application, and in view of my above ruling, these preliminary objections are also overruled. The senior assistant registrar is directed to fix the date or dates to hear the applications on their merits.